

## **Sand Dune Rulemaking**

### **Bureau of Land and Water Quality**

**2002**

The Bureau of Land and Water Quality has been compiling information with regards to coastal sand dunes over the past couple of years in anticipation of initiating formal rulemaking to Chapter 355, Coastal Sand Dune Rules, under the Natural Resources Protection Act. The last major revision to the rules occurred in 1993.

The impetus for this rule change is twofold. The Department has undertaken to improve numerous aspects of the current rule to improve its comprehension by the public, local officials and staff, remove/clarify a number of exemptions and to allow new construction in frontal dunes in a limited number of situations to address potential constitutional takings issues. Two takings cases ( Fichter and Wyer ) pursuant to the Sand Dune Rules were adjudicated in Maine courts over the past couple of years. In one case, the State was successful in establishing that a constitutional takings did not occur and in another case, the State was unsuccessful. Recent discussions with representatives of the Maine Office of the Attorney General suggest that this issue is likely to become increasingly controversial in the future.

The Department has also considered whether to propose a hardship variance provision to address those vacant lots in sand dunes that do not meet the proposed provision for being located in a developed area, i. e. have structures on adjacent lots. The total number of vacant lots in Maine's coastal sand dunes is in the range of 60-70. More than half of these lots are precluded from development due to their locations in Resource Protection Zones, located in Essential Habitat for wildlife as mapped by the Dept. of Inland Fisheries and Wildlife, are too small to be constructed on per local standards. Many of the remaining are owned by lot owners across a road ostensibly to provide views.

The Department is taking the position that potential development in these areas has significant implications for the Department, other State resource agencies and the public and should best be decided upon by the State Legislature. The Department will consider pursuing this action in the upcoming session of the Legislature.

In addition the Department has included a provision to require all new and reconstructed buildings in frontal dunes and unstable back dune locations to be constructed on post or pile foundations. This Board of Environmental Protection has previously asked that the Department include such a provision in the rule. Construction on post or pile foundations would allow for sand and water movement to occur unrestricted and to reduce the potential damage to structures in coastal sand dune systems.

The major revisions to the rule include:

- Frontal dune reconstruction, new construction in developed frontal dune areas, and construction in back dune areas where stability is a concern will be required to be supported on post or pile foundations with the bottom of the first floor sills elevated 3 feet above the highest elevation within the building footprint or adjacent to an existing foundation or meet the local floodplain requirement,

whichever is higher. This provision would significantly increase the ability of sand and water to move freely within the beach system and would significantly improve the ability of these structures to withstand coastal flood hazards.

- The current exemption for second story additions or the addition of dormers is being eliminated as an exemption. The Natural Resources Protection Act provides a statutory exemption for maintenance and repair of structures as long as the work does not exceed 50% of the structure. These two exemptions combined have resulted in numerous instances of significant expansions of structures without any environmental review. The draft proposal would require applications for all second story and dormer expansions. Such expansions would be required to meet the requirement for post and pile foundations listed above.
- The current exemption in the rule for maintenance and repair as well as the prohibition for reconstruction of buildings damaged by more than 50% due to an ocean storm relies on a determination of appraised market value. In many instances when the work has already been completed, or in the event of an ocean storm, the determination of appraised market value is extremely difficult at best to determine. The draft rule proposes that the determination of value be based upon the assessed evaluation as determined by the local municipality.
- The Department has included in the draft rule a provision to allow for the construction of ramps, fire escapes and other structures in frontal dunes to meet ADA and local fire code requirements.
- The Department has included in the draft rule a provision to allow for new buildings to be constructed on vacant lots in areas where the surrounding lots are already developed. This provision would apply whenever a structure is located within 100 feet on either side of a vacant lot. Construction on the lot would be required to be built on posts or piles as described above and would be limited to construction of a building or buildings ( 20% of the lot ) and limited parking and access areas. The Department has analyzed the southern Maine coastal beaches and, with the exception of Hunnewell Beach in the Town of Phippsburg, has identified 7 lots which would meet the definition of being located in a developed area. The situation at Hunnewell Beach is that there are a preponderance of lots contained within a very old subdivision located on a sand dune system which is the subject of much controversy with regards to paper roads and indeterminate lots lines, etc. An analysis by staff, however, reveals only a very limited number of lots would potentially meet the definition of developed areas.

The Department has included this provision in the draft rule to address the potential for a takings determination in the developed and least environmentally sensitive areas in coastal sand dune areas.

- Section 480-W of the Natural Resources Protection Act provides that landowners may take emergency actions, including the placement of rip rap, to protect the integrity of seawalls destroyed or threatened in coastal sand dunes without obtaining a permit from the Department. The Department has included in the draft rule a requirement that anyone undertaking such actions provide a plan to restore the integrity of the seawall and remove any additional materials, e. g. rip rap, within one year.